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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SCOTT WAYNE BLYSTONE,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme
Court Of The Commonwealth Of Pennsylvania

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the mandatory feature of the Pennsylvania death penalty statute—which required a death sentence for Mr. Blystone when the jury found one aggravating circumstance and no mitigating circumstances—created a risk that Mr. Blystone was unreliably sentenced to death in violation of the Eighth Amendment, because it precluded his jury from deciding whether the sole aggravating circumstance actually warranted the death penalty, because it increased the risk that the jury would give no consideration to unenumerated mitigating circumstances, and because it allowed for a life sentence only if his jurors were willing to disobey the instructions they were given?

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OPINION BELOW

The opinion of the Supreme Court of Pennsylvania affirming Mr. Blystone's conviction and sentence of death is reported as *Commonwealth v. Blystone*, ___ Pa. ___, 549 A.2d 81 (1988). It is set forth in the Joint Appendix (hereafter, "J.A.") at pages 94-149.

JURISDICTIONAL GROUNDS

The Court has jurisdiction under 28 U.S.C. § 1257(3). The judgment of the Supreme Court of Pennsylvania was entered on October 17, 1988, and a timely petition for certiorari was filed on December 16, 1988. Certiorari was granted on March 27, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States, which provide in relevant part:

Excessive bail shall not be required . . . nor cruel and unusual punishment inflicted.

[N]or shall any state deprive any person of life, liberty, or property, without due process of law.

This case also involves the following provisions of the Pennsylvania Consolidated Statutes: 18 Pa. C.S. § 2502 (murder of the first degree) and 42 Pa. C.S. § 9711 (sentencing procedure in capital cases). Because of their length, these provisions are set forth in Appendix A, *infra*.

STATEMENT OF THE CASE

On the night of September 9, 1983, Scott Blystone, his girlfriend and another couple were out for a drive. During the course of the evening, Blystone bought a fifth of

whiskey. R. 24-B. At approximately 11:00 P.M. he observed Dalton Smithburger hitchhiking. R. 102. Blystone told his companions that he intended to pick Smithburger up in order to rob him. R. 5-B-6-B. Blystone pulled over and offered Smithburger a ride; Smithburger accepted. R. 6-B.

After restarting the car Blystone informed Smithburger of their need for gas and asked him to contribute to its purchase. R. 6-A. Disbelieving Smithburger's response that he had only a few dollars, Blystone drew out a pistol. R. 7-B, 102. After a short drive Blystone ordered Smithburger out of the car, saying that all he wanted was cash. R. 8-B. At gun point, he walked Smithburger into a field adjacent to the road. R. 9-B. There he searched Smithburger and took all of his money, amounting to some thirteen dollars. R. 103. He told Smithburger to lie face down while he returned to the car. R. 104. At the car Blystone told his companions that he was concerned that Smithburger could identify them. R. 9-B, 104. He asked how they would feel about killing Smithburger. R. 104. According to Blystone's account to a friend thereafter, "Everybody said 'yeh, go ahead, kill him'" R. 104.¹ Blystone returned to the field and asked Smithburger what he remembered about the car. R. 104-105. Smithburger replied that he recalled its color and that its rear had been damaged. R. 105. Blystone then shot and killed him. R. 105.

In the guilt phase of Blystone's trial in the Court of Common Pleas of Fayette County, the Commonwealth

¹ The recollection of two of the others in the car was similar. Barbara Clark testified that the response was "do whatever you want to do," R. 10-A, and Jackie Guthrie, that it was "do whatever you have to do," R. 10-B.

proved these events by the testimony of Blystone's companions and an audiotape of a conversation between Blystone and a police informant. R. 100-120. Blystone presented no evidence. The jury convicted him of first degree murder, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery. R. 138-39.²

Immediately following the guilty verdict, a sentencing hearing was held pursuant to 42 Pa. C.S. § 9711. R. 139. No additional evidence was presented by the Commonwealth or by Blystone. R. 140-44. In closing argument, the prosecutor asked the jury to find a single aggravating circumstance: that "[t]he defendant committed a killing while in the perpetration of a felony," 42 Pa. C.S. § 9711 (d)(6). R. 146. The prosecutor argued that this circumstance was already established by Blystone's conviction of robbery. R. 146.

The prosecutor told the jury that,

Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your duty to impose the death penalty, or if you have an aggravating circumstance and it outweighs any mitigating circumstances you may find, it is your duty to impose the death penalty. . . .

R. 2.³ Thereafter he reiterated,

You must determine from the evidence presented in this courtroom whether or not there are any mitigat-

² First degree murder in Pennsylvania requires an "intentional killing," defined as a "willful, deliberate and premeditated killing." 19 Pa. C.S. § 2502.

³ The prosecutor's closing penalty phase argument is set forth in a separately paginated volume which was transcribed on April 16, 1985.

ing circumstances. If not, you must impose the death penalty.

Ibid.

The trial judge instructed the jury,

[T]here is only one aggravating circumstance that you could find, and that is that the killing occurred in the commission of the felony of robbery, if you find this occurred beyond a reasonable doubt. If you find that there is an aggravating circumstance, and you must unanimously find it, you would then need to determine if there were any mitigating circumstances, which I will explain to you.

R. 148. Tracking 42 Pa. C.S. § 9711 (c)(1)(iv), whose constitutionality Blystone unsuccessfully challenged on the ground that it provided for mandatory capital sentencing,⁴ the trial judge then charged the jury that it was obliged to return a death sentence under certain circumstances and to return a life sentence under other circumstances:

If you find an aggravating circumstance and no mitigating circumstance, it is your duty to return a verdict of death. If you find that there are mitigating circumstances, then you would need to determine whether the aggravating circumstance or aggravat-

⁴ 42 Pa. C.S. § 9711 (c)(1) provides:

Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

....

- (iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

ing circumstances that you found outweigh the mitigating circumstances; that is, in balancing the two, if the aggravation of this killing outweighed the mitigation, you must return the death penalty. If you find no aggravating circumstances, you must return the penalty of life imprisonment, or if you find that the mitigating circumstances outweigh the aggravating circumstances, you must return life imprisonment.

Ibid.

With regard to mitigating circumstances the judge instructed:

These are the things you could consider, but I stress to you that you cannot consider them unless there is some evidence that relates to them. One is that the defendant has no significant history of prior criminal convictions. Also, that the defendant was under the influence of extreme mental or emotional disturbance; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; the youth or advanced age of the defendant at the time of the crime; the defendant acted under extreme duress or acted under the substantial domination of another person; the victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts; the defendant's participation in the homicidal act was relatively minor; any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense.

R. 149. "In order to consider [mitigating circumstances]," the judge told the jury, it "would have to find evidence that would justify the finding of mitigating circumstances." R. 148-49, and would have to make "that finding of mitigating [sic] . . . by a preponderance of the evidence," R. 149. Mitigating circumstances, he reiterated, "are only applicable if proven by a fair preponderance of the evidence." R. 149. Summing up the jury's duty in

considering aggravating and mitigating circumstances, the judge concluded that,

Your verdict must be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances, or if you unanimously find one or more aggravating circumstances which outweigh any mitigating circumstances. In all other cases your verdict must be a sentence of life imprisonment.

R. 150.

After approximately half an hour of deliberation, the jury requested re-instruction on "what constitutes a mitigating circumstance." R. 153. The judge repeated the same list of eight mitigating circumstances, *id.*, and explained the relationship between the first seven circumstances and the eighth ("any other mitigating matter") by saying: "The first seven are the specific matters you could consider. The last is the catch-all—any other mitigating circumstances that result from the character and record of the defendant or the circumstances of the case." R. 153-54. A juror asked for further instruction on the "any other" mitigating circumstance, and the judge responded:

It states "any other mitigating matter concerning the character or record of the defendant or the circumstances of his offense." This is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance, but it should be, in determining it, something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense. If you find anything in these that you consider to be mitigating, you might consider them, and then you would weigh whatever you found to be mitigating against whatever you found to be aggravating, if you found aggravating.

R. 154.

After further deliberation, the jury returned a verdict of death, based on the finding of one aggravating circumstance—murder during the commission of a robbery—and no mitigating circumstances. R. 155-56.

On direct appeal, the Pennsylvania Supreme Court affirmed the judgment of conviction and sentence of death. *Commonwealth v. Blystone*, ___ Pa. ___, 549 A.2d 81 (1988); J.A. 94. It rejected Blystone's contention that the statutorily prescribed jury instructions operated in his case to require a mandatory death sentence in violation of the Eighth and Fourteenth Amendments. J.A. 94.

SUMMARY OF ARGUMENT

In its application to Mr. Blystone's case, the Pennsylvania death penalty statute violated settled Eighth Amendment rules. As the instructions to Mr. Blystone's jury made clear, there is a mandatory feature to Pennsylvania's capital sentencing scheme. The jury "must" return a verdict of death if it finds—as Mr. Blystone's jury did—one or more aggravating circumstance(s) and no mitigating circumstances. Without further instructions regarding the jury's responsibility to evaluate all of the facts about the crime and the defendant as the basis for its sentencing choice, this mandatory feature created a substantial risk that the decision to sentence Mr. Blystone to death was not the result of an individualized determination that death was the appropriate sentence.

One of the fundamental principles of the Court's Eighth Amendment jurisprudence is that procedures providing for imposition of the death penalty must satisfy "the Eighth Amendment's 'heightened need for reliability in

the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985). The most consistent application of this principle has been to assure that the capital sentencer is not legally precluded from considering "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Capital sentencing reliability is jeopardized in two ways when a state forbids the lawful consideration of these kinds of evidence. First, there is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. Second, juries forbidden to give lawful consideration to powerful sentencing factors may consider them unlawfully, with results that are unreliable precisely because they are legally ungoverned and subject to the whim of the particular jury. *Woodson v. North Carolina*, 428 U.S. 280, 302-303 (1976) (plurality opinion). The reliability of the decision to impose death in Mr. Blystone's case was jeopardized in both of these ways.

Two deficiencies in the sentencing phase instructions created the risk that factors calling for a life sentence were not taken into account. First, the jury was not instructed to consider whether the aggravating circumstance that it found was sufficient to call for the death penalty. Yet, "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending upon the nature of the [aggravating circumstance]." *Sumner v. Shuman*, 97 L.Ed.2d 56, 69 (1987). The jury could have found that Mr. Blystone was not sufficiently culpable to be sentenced to death solely because he had committed a murder during the course of a

robbery. However, the instructions precluded the jury from making this judgment in his sentencing proceeding. Second, the jury was not instructed to consider as unenumerated, "other" mitigating circumstances facts which were relevant to, but failed to establish, any of Pennsylvania's seven enumerated mitigating circumstances. It is likely in this situation that the mandatory feature of the sentencing scheme foreclosed the jury's consideration of pertinent unenumerated mitigating circumstances in deciding Mr. Blystone's sentence. See *Hitchcock v. Dugger*, 95 L.Ed.2d 347 (1987).

The reliability of Mr. Blystone's death sentence was also undermined by the lawless sentencing process engendered by Pennsylvania's prohibition of the lawful consideration of relevant evidence. In fifty cases tried under the current Pennsylvania death penalty statute, the sentencing juries have found, as did Mr. Blystone's jury, one aggravating circumstance and no mitigating circumstances. Under the Pennsylvania statute, and the instructions in each of these cases, a death sentence should have been imposed in each case. However, death has been imposed in only twelve of these cases. Mr. Blystone's case is one of the twelve.

This is not a pattern produced by isolated, aberrant acts of mercy on the part of maverick juries. It is the product of a procedure so rigid in its unresponsiveness to relevant sentencing considerations that it forces juries routinely to respond outside the law. Whether because the aggravating circumstance that was found was illegally weighed and deemed not to warrant death on the facts of the particular case or because mitigation excluded by the statutory categories was illegally considered, juries told that they could not give effect to "factors" calling "for a less severe penalty," *Lockett v. Ohio*, 438 U.S. at 605,

within Pennsylvania's mandatory capital sentencing rules have proceeded systematically to break the rules.

A sentencing system which thus compels the actual decisionmaking process to operate extralegally cannot assure reliability in the determination that death is the appropriate sentence in any specific case. "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts v. Louisiana*, 428 U.S. 328, 335 (1976) (plurality opinion). Mr. Blystone's sentence, imposed by a jury which was unwilling to disobey the instructions, cannot stand as a reliable determination that death was the appropriate sentence for him.

ARGUMENT

AS APPLIED IN PETITIONER'S CASE, THE JURY INSTRUCTIONS REQUIRED BY THE PENNSYLVANIA DEATH PENALTY STATUTE PRECLUDED AN INDIVIDUALIZED DETERMINATION THAT DEATH WAS THE APPROPRIATE SENTENCE AND CREATED AN UNCONSTITUTIONAL RISK THAT DEATH WAS IMPOSED IN DISREGARD OF FACTS CALLING FOR A LESSER SENTENCE

A. Introduction: The Eighth Amendment Requires That The Sentencing Decision In A Capital Case Be Individualized And Reliable

As the Court explained in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), "[s]ince the early days of the common law, the legal system has struggled to accommodate . . . twin objectives" in developing a system of capital punishment to be "at once consistent and principled but also humane and sensible to the uniqueness of the individual." In its 1976 decisions, the Court recognized that the objective of consistency could not be satisfied by mandatory

death sentences, because their inflexibility not only disregarded the uniqueness of the individual but also undermined the very principle that the Court sought to promote: the "consistency" that such mandatory death sentences produced "by ignoring individual differences[,] is a false consistency." *Eddings v. Oklahoma*, 455 U.S. at 112. Indeed, the mechanistic rigidity of mandatory death-sentencing schemes is one of the principal reasons why such schemes do "not fulfill *Furman's* basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a death sentence." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion). Mandatory death sentences' failure to provide a sufficiently flexible legal framework to permit the rational consideration of pertinent sentencing considerations in specific cases inevitably invites juries to ignore the law when those considerations are compelling; and there is "no way . . . for the judiciary to check [this] arbitrary and capricious exercise of power through a review of death sentences." *Ibid.*

Since 1976, the Court's Eighth Amendment cases have accommodated the concerns for a consistent, principled administration of the death penalty and for a humane appreciation of the uniqueness of the individual by developing the over-arching concept that the Amendment stands to assure "reliability in the determination that death is the appropriate punishment" in any capital case." *Johnson v. Mississippi*, 100 L.Ed.2d 575, 584 (1988). See, e.g., *Woodson v. North Carolina*, *supra*, 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349 (1977); *Beck v. Alabama*, 447 U.S. 625 (1980). Because reliability is jeopardized by an unchanneled sentencing process, the Court has insisted that capital statutes "genuinely narrow the

class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.” *Lowenfield v. Phelps*, 98 L.Ed.2d 568, 581 (1988). See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 100 L.Ed.2d 372 (1988). Because reliability is jeopardized by disregarding pertinent sentencing factors, the Court has insisted that “consideration of the character and record of the individual offender and the circumstances of the particular offense [is] . . . a constitutionally indispensable part of the process of inflicting the penalty of death.” *Woodson v. North Carolina*, *supra*, 428 U.S. at 304 (plurality opinion). See, e.g., [*Harry*] *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam); *Hitchcock v. Dugger*, 95 L.Ed.2d 347 (1987).

Thus have emerged the two bedrock principles of capital Eighth Amendment jurisprudence. Any death-penalty scheme must provide for an *individualized* sentencing decision. E.g., *Jurek v. Texas*, 428 U.S. 262 (1976) (plurality opinion); *Woodson v. North Carolina*, *supra*; [*Stanislaus*] *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Eddings v. Oklahoma*, *supra*; *Sumner v. Shuman*, 97 L.Ed.2d 56 (1987). It must also provide a *rational framework* which assures consistency in decisionmaking. *Godfrey v. Georgia*, *supra*; *Zant v. Stephens*, 462 U.S. 862 (1983); *Cartwright v. Maynard*, *supra*. Guided by these twin principles, the Court has uniformly invalidated procedures that threaten the reliability of capital adjudications by depriving judges and jurors of the capacity to make a reasoned, graduated response to the facts of individual cases. E.g., *Lockett v. Ohio*, 438 U.S. 586 (1978); *Beck v. Alabama*, *supra*; *Mills v. Maryland*, 100 L. Ed. 2d 384 (1988).

Under a capital sentencing procedure that relies upon aggravating and mitigating circumstances to channel

decisionmaking, consistency and principled application of the death penalty are assured primarily through the legislature’s articulation of the aggravating circumstances. Through “legislative definition,” the statutory aggravating circumstances “circumscribe the class of persons eligible for the death penalty.” *Zant v. Stephens*, 462 U.S. at 878. Humaneness and sensitivity to the uniqueness of the individual are then assured by an individualized sentencing determination for any person who is a member of the death-eligible class. Such a sentencing process requires “an *individualized* determination [of sentence] on the basis of the character of the individual and the circumstances of the crime.” *Id.* at 879 (emphasis in original). See, e.g., *Lockett v. Ohio*, *supra*; *Skipper v. South Carolina*, 476 U.S. 1 (1986). Writing for the Court in *California v. Ramos*, 463 U.S. 992 (1983), Justice O’Connor described the requisites of a constitutional death sentencing procedure in the following terms:

Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment. In this sense, the jury’s choice between life and death must be individualized.

Id. at 1008.

In its application to Mr. Blystone’s case, the Pennsylvania death penalty statute has violated these settled Eighth Amendment rules. As the instructions to Mr. Blystone’s jury made clear, there is a mandatory feature to Pennsylvania’s capital sentencing scheme. The jury “must” return a verdict of death if it finds—as Mr. Blystone’s jury did—one or more aggravating circumstance(s) and no mitigating circumstances. Without fur-

ther instructions regarding the jury's responsibility to evaluate all of the facts about the crime and the defendant as the basis for its sentencing choice, this mandatory feature creates a substantial risk that in cases like Mr. Blystone's the decision to impose death will not be the result of an individualized determination that death is the appropriate sentence.

This risk arose in Mr. Blystone's case in two specific ways. First, the jury was not instructed to consider whether the aggravating circumstance that it found was sufficient to call for the death penalty. Yet, "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending upon the nature of the [aggravating circumstance]," *Sumner v. Shuman*, *supra*, 97 L.Ed.2d at 69. The jury could have found that Mr. Blystone was not sufficiently culpable to be sentenced to death solely because he had committed a murder during the course of a robbery. However, the instructions precluded the jury from making this judgment. Second, the jury was not instructed to consider as unenumerated, "other" mitigating circumstances facts which were relevant to, but failed to establish any of Pennsylvania's seven enumerated mitigating circumstances. It is likely in this situation that the mandatory feature of the sentencing scheme foreclosed the jury's consideration of pertinent unenumerated mitigating circumstances in deciding Mr. Blystone's sentence. *See Hitchcock v. Dugger*, *supra*.

Such a sentencing procedure is rife with the dangers that have caused this Court to disallow other forms of mandatory capital punishment. Not only is the jury forbidden to give lawful effect to the existence of facts that are rationally relevant to its sentencing options, but is compelled to give unlawful effect to those facts (by violating the Court's instructions) if it chooses to acknowledge

them at all. As the Court recognized in *Woodson v. North Carolina*, *supra* 428 U.S. at 293, 294 n.29, mandatory sentencing schemes give rise to the possibility of arbitrary and unreliable jury responses. When a jury believes that death is not the appropriate sentence in a particular case but feels constrained to impose death if the court's instructions are followed, the jury may disregard the instructions and impose life anyway. This has commonly happened in Pennsylvania. Other defendants in whose cases juries found the very same array of aggravating and mitigating circumstances found by Mr. Blystone's jury have received a life sentence in disregard of the law and of the Court's instructions. Why other defendants did and Mr. Blystone did not is neither knowable nor controllable under Pennsylvania's procedure. In this regard as well, Mr. Blystone was deprived of the reliable capital sentencing determination to which he is constitutionally entitled.

B. The Mandatory Feature Of Mr. Blystone's Jury Instructions Precluded The Jury From Evaluating The Weight Of The Particular Aggravating Circumstance Found In His Case

Pennsylvania has sought to eliminate the sentencer's discretion to evaluate the weight of aggravation in a given case independently of mitigation. Unless the jury finds some mitigating circumstance established by a preponderance of the evidence, the finding of a single aggravating circumstance mandates the death penalty, without consideration of the degree of aggravation presented by the facts. In Mr. Blystone's case, the killing concededly occurred during the commission of a felony. Once the jury found that no mitigating circumstances had been proved, death became automatic. Such a sentencing scheme violates the right to an individualized sentencing determina-

tion every bit as much as a scheme which precludes the consideration of mitigating circumstances.

It is true that the Court has not often been called upon to emphasize the necessity for the exercise of judgment by a capital sentencer in evaluating aggravation on the facts of a particular case. The Court's discussion of aggravating circumstances has come primarily in the context of contentions that a State's definition or application of its statutory aggravating circumstances failed sufficiently to narrow the class of defendants eligible for the death penalty. *See, e.g., Lowenfield v. Phelps, supra; Maynard v. Cartwright, supra.* Without question, a state legislature is to be given wide latitude at the stage of legislative definition (*see Zant v. Stephens, supra*, 462, U.S. at 878 & n. 17) in deciding which defendants can be made eligible for the death penalty.

It does not follow that legislators are constitutionally permitted to decree that, in the absence of mitigation, death is *always* the appropriate penalty for a crime which falls within that class or broadly defined category of aggravation. To the contrary, the Eighth Amendment's basic command of individualized capital sentencing prohibits the legislature from making that kind of categorical decree, for "[o]nce the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty," the capital defendant's right to an individualized sentencing decision requires that "the jury [be] free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. at 1008.

Thus, a jury may decide in a particular case that even though a statutory aggravating circumstance exists, it is "insufficiently weighty to support the ultimate sentence."

Barclay v. Florida, 463 U.S. 939, 964 (1983) (Stevens, J., joined by Powell, J., concurring in the judgment). The plurality in *Barclay* similarly acknowledged that the sentencer will normally decide whether a statutory aggravating circumstance, even though present, "warrants imposition of the death penalty." *Id.* at 949-50.

Moreover, in *Sumner v. Shuman*, the Court recognized explicitly that the Eighth Amendment requires that the sentencer be allowed to evaluate the weight of aggravating circumstances, not only in relation to mitigating circumstances, but also in their own right, to determine how heavily they weigh in favor of a death sentence. 97 L.Ed.2d at 69. As the Court explained,

Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, *but the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense.*

Ibid. (emphasis supplied). One of the constitutional problems with a statute which mandates death whenever this particular aggravating factor is established is that "all [prior] offenses are given the same weight" *Ibid.* The identical problem is present in Mr. Blystone's case, where the only aggravating circumstance established—like the prior convictions discussed in *Shuman*—gives rise to varying possible inferences concerning his character and moral culpability.

The breadth of the aggravating circumstance in Mr. Blystone's case, that "[t]he defendant committed a killing while in the perpetration of a felony," demonstrates the importance of sentencer discretion in weighing aggravation. "The diversity of circumstances presented in cases

falling within the single category of killings during the commission of a specified felony . . .," *Roberts v. Louisiana, supra*, 428 U.S. at 333, makes it impossible to say categorically that all such cases warrant death absent mitigation. In Pennsylvania, this aggravating circumstance can be established by the commission of a non-violent felony, *Commonwealth v. Holcomb*, 508 Pa. 425, 498 A.2d 833 (1985) (plurality opinion); clearly, the death penalty might well be deemed not appropriate in such a case. Even given the more typical fact pattern of a killing during a violent felony such as robbery, as in Blystone's case, there are still a myriad of fact patterns—and associated levels of moral culpability—that such killings may involve. Indeed, in the absence of some additional aggravating circumstance, like the probability of the defendant's future dangerousness, the commission of a murder during a robbery may simply not be seen as one in which the death sentence is warranted.⁵

⁵ In at least one State, Florida, the supreme court has determined that no death sentence can be imposed if the only aggravating circumstance is the "felony murder" circumstance. See, e.g., *McCaskill v. State*, 344 So.2d 1276 (Fla. 1977) (murder in the course of robbery); *Proffitt v. State*, 510 So.2d 896 (Fla. 1988) (murder in the course of burglary).

In other States including Pennsylvania, prosecutors frequently do not seek the death penalty when felony murder is the only statutory aggravating circumstance present. Without consideration, or even investigation, of possible mitigating circumstances, a prosecutor will typically make the judgment, for example, that a shooting during a holdup is not one of those extreme cases which warrants death. Under *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), prosecutors can make this judgment without offending the Constitution. If a prosecutor may make the judgment that a particular killing, although attended by a statutory aggravating circumstance, is not aggravated enough to warrant death, then surely the jury, constitutionally obligated to provide individualized sentencing, must be allowed the same opportunity.

Even the Pennsylvania Supreme Court accepts the proposition that some killings during felonies might properly be thought by a jury not to deserve the death penalty. The plurality in *Holcomb, supra*, sought to find discretion in the jury to make such a judgment as a mitigating circumstance. 508 Pa. at ___, 498 A. 2d at 854. But this attempt at a saving interpretation of the Pennsylvania statute fails for several reasons in Mr. Blystone's case.

First, the *Holcomb* interpretation, announced in 1985, was unsurprisingly not reflected in any way in the jury instructions given at Mr. Blystone's 1984 penalty trial. Under the instructions that were given in Mr. Blystone's case, no reasonable juror could conceivably have imagined that the failure of the felony-murder aggravating circumstance to be aggravated enough to warrant death could be considered as a "mitigating circumstance" established by a preponderance of the evidence. Cf. *Mills v. Maryland supra*; *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Andres v. United States*, 333 U.S. 340, 352 (1948). Neither the jury instructions nor the statutory language on which they were based can fairly support such a strained construction. The jury was unequivocally told that if it found the felony-murder aggravating circumstance established beyond a reasonable doubt and did not find any mitigating circumstance established by a preponderance of the evidence, its verdict *must* be death. It is hard to envision an English-speaking juror concluding from this language that the very same circumstance, felony murder, which was explicitly defined as "an aggravating circumstance" (R. 148) and as the "one . . . aggravating circumstance that you could find" (*ibid.*), would simultaneously demand a verdict of death and constitute a mitigating circumstance allowing life.

The second flaw in the idea that a relative weakness of aggravation could be understood as a mitigating circum-

stance is that this idea twists the very concept of mitigation into unrecognizability. Common parlance and legal tradition alike identify mitigating circumstances with "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. at 304. That is, mitigation represents either some sort of extenuation or excuse for the commission of the crime or something positive about the defendant's character. The fact that crime, though evil, is not sufficiently evil to call for death, is not in any non-artificial sense mitigating. Such a fact might certainly lead the jury not to impose the death penalty—if the jury is instructed that it can consider the fact for that purpose—but not because the fact *reduces* the culpability inherent in the crime. Rather, the jury would simply be saying that the amount of culpability in the case before it is not great enough to deserve death.

To put the matter another way, the mere fact that the crime was not worse is not mitigation. Such a judgment by the jury represents an individualized evaluation of the weight of aggravation, not a finding of mitigation. As such it is within the role assigned to a capital jury by this Court's Eighth Amendment cases, but it was expressly forbidden by the sentencing instructions given under the Pennsylvania statute at Mr. Blystone's trial.

The distinction between the inadequacy of aggravation in a given case and the presence of mitigation was precisely captured by Justice Stevens through his reference in *Barclay* to aggravation being "insufficiently weighty," 463 U.S. at 964, to justify death. A judgment of this kind is not an arbitrary exercise of unbridled discretion but a rational response to the evidence. It is made by prosecutors all the time. *See* note 3, *supra*. Any truly individualized capital sentencing decision must be informed by

the common sense notion that the death penalty should be reserved for the worst cases. *See Gregg v. Georgia, supra*, 428 U.S. at 184 (plurality opinion). No doubt the difference between cases that receive the death penalty and those that do not will often be described by the presence or absence of mitigating circumstances. But not always. In some cases, full consideration of the circumstance of the offense will include the jury's judgment that, based on all the facts, a particular case simply does not warrant death.

For these reasons, the command of the Eighth Amendment is consistent with the view of capital sentencing discretion which has long informed this Court's decisions. As this Court construed the discretion vested in the capital sentencer by Congress in 1897,

The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of [the] opinion that it would not be just or wise to impose capital punishment.

Winston v. United States, 172 U.S. 303, 313 (1899).

Mr. Blystone's jury requested reinstruction of the meaning of mitigation. This suggests that one or more jurors had some hesitancy about taking his life. Given the relative weakness of mitigation in the case, this hesitancy may well have reflected a feeling by one or more jurors that his crime did not warrant death.⁶ Thus it is distinctly

⁶ In this regard, it should be noted that notwithstanding the cold and calculated quality of Mr. Blystone's homicide, juries confronting facts far more egregious have refused to impose death. *See* cases collected in Appendix B, attached hereto.

possible that Mr. Blystone was condemned because his jury was forbidden to make an individualized assessment of the weight of aggravation.

C. The Mandatory Feature Of The Sentencing Instructions Unconstitutionally Limited The Jury's Consideration Of Unenumerated Mitigation

The Pennsylvania death penalty statute provides a list of seven enumerated mitigating circumstances and one "catch-all" circumstance that allows for consideration of unenumerated mitigation. 42 Pa. C.S. § 9711 (e). The statute requires that "mitigating circumstances must be proved by the defendant by a preponderance of the evidence." Section 9711 (c) (iii). The jury is to be instructed that, if one aggravating circumstance is proved and no mitigating circumstance is proved, "the verdict must be a sentence of death." Section 9711 (c)(iv). Mr. Blystone's jury was instructed according to the statute in all of these regards, *see* pages 4-8, *supra*, and its death verdict was explicitly predicated on a finding of one aggravating and no mitigating circumstances, R. 155-56.

Such a verdict cannot withstand constitutional scrutiny if the effect of the sentencing instructions was to foreclose the jury's consideration of any mitigating circumstances. This Court has held that a capital sentencer's consideration of potential mitigation must be uninhibited. *See Hitchcock v. Dugger, supra*, 95 L. Ed.2d at 353 (death penalty reversed because the "jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances . . ."); *McCleskey v. Kemp*, 95 L. Ed.2d 262, 293 n.37 (1987) ("[w]e have held that the Constitution requires that juries be allowed to consider 'any relevant mitigating factor,' even if it is not included in a statutory list," citing *Eddings v. Oklahoma*, 455 U.S. at 112).

The instructions in Mr. Blystone's case impeded the consideration of certain types of unenumerated mitigation. For example, Mr. Blystone's jury was instructed that it could find as a mitigating circumstance that "the defendant was under the influence of extreme mental or emotional disturbance." R. 149. This instruction, based on 42 Pa. C.S. § 9711 (e)(2), did not permit any mitigating weight to be given to a finding that the defendant was mentally disturbed unless the disturbance was "extreme." Mr. Blystone's jury was also instructed (under 42 Pa. C.S. § 9711 (e)(5)) that it could find as a mitigating circumstance that "the defendant acted under extreme duress or acted under the substantial domination of another person." R. 149. Lesser degrees of influence exerted by accomplices could not be considered consistently with this instruction, even though jurors who were left free to consider them might have deemed them mitigating. And under the instructions, of course, if the preclusion of consideration of these various kinds of mitigation resulted in the jury's finding "no mitigating circumstances," then its verdict "must be a sentence of death." R. 148; *see also* R. 150.

Instructions to consider the eighth, "catch-all" mitigating circumstance, set forth in § 9711 (e)(8), did not alleviate the restrictions imposed on mitigation by the earlier instructions. In the first place, subsection (e)(8) is limited by its terms to "[a]ny other evidence of mitigation" (emphasis supplied). Thus, subsection (e)(8) would not appear to permit consideration of kinds of mitigation that fall within the ambit of one of the seven specifically enumerated mitigating circumstances but are excluded from consideration under them by their explicit limitations—e.g., subsection (e)(5) which restricts mitigation to a showing that the defendant acted under *extreme* duress.

Notably, when the Pennsylvania Supreme Court held that "middle-age" could not be proved under 42 Pa. C. S. § 9711 (e)(4) ("[t]he age of the defendant at the time of the crime"), the court did not then say that such evidence could be offered under subsection (e)(8), but held that such evidence "can in no way be offered as a factor in mitigation." *Commonwealth v. Frey*, 504 Pa. 428, —, 475 A.2d 700, 706 (1984), *cert. denied*, 469 U.S. 963 (1984).

More important, the instructions given to Mr. Blystone's jury could never be understood to permit the consideration of statutorily insufficient quantities of enumerated mitigation as *unenumerated* mitigation. The trial judge recited to the jury all seven of Pennsylvania's enumerated mitigating circumstances, replete with qualifiers of degree—"no *significant* history of prior criminal convictions"; "*extreme* mental or emotional disturbance"; "*substantially* impaired" capacity; "*extreme* duress"; "*substantial* domination"; "*relatively minor* participation"; and so forth, *see* R. 149, 153 and then told the jury four times that the "catch-all" mitigating circumstance of subsection (e)(8) was a finding of "any *other* mitigating matter concerning the character or record of the defendant, or the circumstances of his offense," *see* R. 149, 153, 153-54, 154 (emphasis supplied). In this context, "other" could only mean to a reasonable juror, "mitigating matter of a different kind than that provided by the enumerated mitigating circumstances." Otherwise, such a juror would wonder, "why on earth are we being asked to make all of these refined judgments of degree, if lesser amounts of mitigation than are needed to constitute enumerated mitigation can be considered anyway, as unenumerated mitigation?" *See Mills v. Maryland*, *supra*, 100 L. Ed.2d at 394-95 (test for evaluating jury instructions in a capital case is what a reasonable juror could have understood).

Moreover, the jury in Mr. Blystone's case returned from its deliberations and asked for further instruction concerning mitigation. After the judge read the eight mitigating circumstances anew, a juror asked specifically about the meaning of "any other mitigating circumstances." The judge did not suggest that degrees of mitigation which were insufficient under the express terms of the first seven mitigating circumstances could nevertheless be considered under the eighth. Rather, the judge once again characterized the eighth mitigating circumstance as "any *other* mitigating matter . . .," R. 153, 154.

Despite Mr. Blystone's failure to present any evidence, there was mitigation in the record that could have been excluded from consideration by these statutory sentencing instructions and reinstructions. Jackie Guthrie, a Commonwealth witness and co-defendant, testified that Mr. Blystone "bought a fifth of whiskey" on the night of the killing, and her testimony suggested that he had been drinking. R. 24-B. Evidence of voluntary intoxication is presumably admissible to prove enumerated mitigating circumstances (e)(2) and (e)(3). *See Commonwealth v. Buehl*, 510 Pa. 363, 508 A.2d 1167 (1986) (evidence of drug use admissible to prove (e)(2) and (e)(3)). But both of these mitigating circumstances contain—and were described to the jury as containing—limitations of degree. Subsection (e)(2) requires "extreme mental or emotional disturbance" and subsection (e)(3) requires that "the capacity of the defendant to . . . conform his conduct to the requirements of law was substantially impaired." Having failed to find either (e)(2) or (e)(3), a juror obedient to the court's instructions would have believed that Mr. Blystone's consumption of alcohol could not be considered at all. And if it could not be considered, the resulting absence of mitigation would require a mandatory death sentence.

A similar impediment was presented with regard to the evidence of Mr. Blystone's commitment to the killing. His cold-blooded description of the night's events to a police informer was doubtless a major factor in the jury's sentence of death. Nevertheless, the bravado manifest in this recorded statement is curiously combined with a marked ambivalence about the killing. Even after telling his confederates that he intended to shoot Mr. Smithburger because he thought that Mr. Smithburger could identify them, Mr. Blystone asked Mr. Smithburger privately what Mr. Smithburger remembered about the car. This followed Mr. Blystone's trip to request and obtain his confederates' assent to the killing. While the killing was obviously fully premeditated, Mr. Blystone appears to have been looking for a *locus poenitentiae* at some level, and the jury could easily have concluded that without the group's support he would not have pulled the trigger. Such a conclusion could constitute relevant mitigation. But it would fall short of the showing specified in the enumerated mitigating circumstance which recognizes that the influence of others may mitigate a murder: that "[t]he defendant . . . acted under the substantial domination of another person," 42 Pa. C.S. § 9711 (e)(5), as charged to Mr. Blystone's jury at J.A. 149, 153. And having found this kind of mitigation shut out the door by the court's instructions based on subsection (e)(5), no reasonable juror would likely have supposed that it could re-enter through the window of "any other mitigating matter" under subsection (e)(8).

Concededly, neither of the items of mitigation that we have just discussed, standing alone, was very strong. But that is precisely the situation in which the mandatory feature of Pennsylvania's capital sentencing procedure does the most harm. Under the procedures of other

States, small items of mitigation that are inconclusive in themselves can be cumulated together and weighed against aggravation. Juries confronted with mitigating circumstances that are not very strong can consider that the aggravating circumstances of the case are also not very strong, when this is so. Pennsylvania's procedure, as it was applied through the sentencing instructions in Mr. Blystone's case, *both* precluded *any* consideration of mitigating circumstances subsumed within an enumerated category that failed to meet its quantitative specifications *and* precluded any evaluation of the weight of aggravation unless a mitigating circumstance was found.

Similarly, under a non-mandatory procedure, in which the jury is permitted to return a life verdict after considering "a myriad of factors," *California v. Ramos, supra*, 463 U.S. at 1008, it would not necessarily be reversible constitutional error to withhold the "enumerated mitigating circumstances" label from particular items of evidence that the jury could nonetheless take into account. Eighth Amendment rules are not concerned with the labels used in a capital sentencing process unless they affect the substance of the process. *Zant v. Stephens, supra*; *Barclay v. Florida, supra*. So long as a sentencing jury is clearly given to understand that it can consider all of the impressions which it draws from the evidence—those that rationally favor life as well as those that rationally favor death—and can evaluate them all in making its decision, the constitutional command of individualized capital sentencing has been met. But that was not the understanding conveyed by the jury instructions in Mr. Blystone's case, and his death sentence must accordingly be reversed.

D. The Mandatory Feature Of The Instructions Interjected Unreliability Into Mr. Blystone's Sentencing Proceeding

As noted in Part A of this brief, one of the fundamental principles of the Court's Eighth Amendment jurispru-

dence is that procedures providing for imposition of the death penalty must satisfy "the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson v. North Carolina*, 428 U.S. at 305). While the principle of heightened reliability has been applied to a variety of state capital procedures, *see, e.g., Turner v. Murray*, 476 U.S. 28, (1986); *Beck v. Alabama*, *supra*; *Johnson v. Mississippi*, *supra*, its most consistent application has been to assure that the capital sentencer is not legally precluded from considering "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, *supra*, 438 U.S. at 604.

Capital sentencing reliability is jeopardized in two ways when a state forbids the lawful consideration of relevant evidence. First, there is "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Id.* at 605. Second, juries forbidden to give lawful consideration to powerful sentencing factors will consider them unlawfully, with results that are unreliable precisely because they are legally ungoverned. *Woodson v. North Carolina*, *supra*, 428 U.S. at 302-303.

We have demonstrated in Parts B and C above that the instructions to Mr. Blystone's jury created "the risk that the death penalty [would] be imposed in spite of factors which . . . call[ed] for a less severe penalty." These same instructions, required by the Pennsylvania statute, have also produced the pattern of lawless jury sentences foretold by *Woodson*.

In Mr. Blystone's case, the Pennsylvania Supreme Court found that his death sentence was "not out of pro-

portion to that imposed on similarly situated defendants." *Commonwealth v. Blystone*, ___ Pa. ___, ___, 549 A.2d 81, 93 (1988); J.A. 94. This conclusion was buttressed by reference to "the continuing study of capital cases maintained by the Administrative Office of Pennsylvania Courts," which "indicates that in those instances in which sentencing bodies have found one or more aggravating circumstances to exist in the absence of any mitigating circumstances, a sentence of death was returned in the overwhelming majority of those prosecutions." *Id.* at n. 22.

But in fact, the capital defendants who are similarly situated to Mr. Blystone are not those in whose case one or more aggravating circumstances and no mitigating circumstances were found. They are those in whose cases only one aggravating circumstance and no mitigating were circumstances found. And according to the study referenced by the Pennsylvania Supreme Court—the pertinent portion of which is attached as Appendix C, *infra*,—during the 1980's, juries in 38 cases disregarded their oaths and returned verdicts of life imprisonment upon a finding of one aggravating circumstance and no mitigating circumstance, while juries in only 12 such cases—one of which was Mr. Blystone's—honored their oaths and returned verdicts of death.

As the Pennsylvania Supreme Court noted in Mr. Blystone's case, "the statute requires a verdict of death" when one aggravating circumstance and no mitigating circumstances are found. *Id.* at ___, 549 A.2d at 93. The jury is always so instructed. Clearly, under the statute every defendant in such a case "should, of necessity, receive the same sentence"—death. *Commonwealth v. Beasley*, 504 Pa. 485, ___, 475 A.2d 730, 738 (1984). Nevertheless, despite the clear statutory language and

uniform instructions, life sentences are returned far more often than not in cases where, like Mr. Blystone's, one aggravating circumstance and no mitigating circumstances are found.

This is not a pattern produced by isolated, aberrant acts of mercy on the part of maverick juries. It is the product of a procedure so rigid in its unresponsiveness to relevant sentencing considerations that it forces juries routinely to respond outside the law. Whether because the aggravating circumstance that was found was illegally weighed and deemed not to warrant death on the facts of the particular case or because mitigation excluded by the statutory categories was illegally considered, juries told that they could not consider "factors" calling "for a less severe penalty" within Pennsylvania's mandatory capital sentencing rules have proceeded systematically to break the rules.

A sentencing system which thus induces the actual decisionmaking process to operate extralegally in a substantial percentage of cases cannot assure reliability in the determination that death is the appropriate sentence in any specific case. "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts v. Louisiana*, *supra*, 428 U.S. at 335.

No one can say with confidence whether Mr. Blystone's jury found itself conflicted between a judgment that death was not the appropriate punishment for this crime and the mandatory sentencing instructions which forbade it to express that judgment lawfully. We do know that the jury returned from deliberating to request further instruction on the meaning of mitigation. The resulting sentence of death may then reflect, not the jury's "reasoned moral

response to the defendant's background, character, and crime," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), but simply the rigidity of the instructions it received. Nor can anyone say with confidence why this jury chose to follow those instructions, while so many other juries have disregarded them. The "capriciousness in making . . . jurors' power [to render individualized sentencing judgments] . . . dependent on their willingness to . . . disregard the trial judge's instructions," *Roberts v. Louisiana*, 428 U.S. at 335, is one of the evils which the Court has sought to eliminate since *Furman v. Georgia*, 408 U.S. 238 (1972). When it enters a case, as it has Mr. Blystone's, the Constitution cannot tolerate the resulting sentence of death.

CONCLUSION

For these reasons, the judgment of the Supreme Court of Pennsylvania affirming petitioner's sentence of death should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

PENNSYLVANIA CONSOLIDATED STATUTES

§ 2502. Murder

(a) **Murder of the first degree.**—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) **Murder of the second degree.**—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) **Murder of the third degree.**—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

(d) **Definitions.**—As used in this section the following words and phrases shall have the meanings given to them in this subsection:

"Fireman." Includes any employee or member of a municipal fire department or volunteer fire company.

"Hijacking." Any unlawful or unauthorized seizure or exercise of control, by force or violence or threat of force or violence.

"Intentional killing." Killing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing.

"Perpetration of a felony." The act of defendant in engaging in or being an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit robbery, rape, or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

"Principal." A person who is the actor or perpetrator of the crime.

§ 9711. Sentencing procedure for murder of the first degree

(a) Procedure in jury trials.—

(1) After a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or live imprisonment.

(2) In the sentencing hearing, evidence may be presented as to any matter that the courts deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e). Evidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d).

(3) After the presentation of evidence, the court shall permit counsel to present argument for or against the sentence of death. The court shall then instruct the jury in accordance with subsection (c).

(4) Failure of the jury to unanimously agree upon a sentence shall not impeach or in any way affect the guilty verdict previously recorded.

(b) Procedure in nonjury trials and guilty plea.—If the defendant has waived a jury trial or pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant with the consent of the Commonwealth, in which case the trial judge shall hear the evidence and determine the penalty in the same manner as would a jury.

(c) Instructions to jury.—

(1) Before the jury retires to consider the sentencing verdict, the court shall instruct the jury on the following matters:

(i) the aggravating circumstances specified in subsection (d) as to which there is some evidence.

(ii) the mitigating circumstances specified in subsection (e) as to which there is some evidence.

(iii) aggravating circumstances must be proved by the Commonwealth beyond a reasonable doubt; mitigating circumstances must be proved by the defendant by a preponderance of the evidence.

(iv) the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

(v) the court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.

(2) The court shall instruct the jury on any other matter that may be just and proper under the circumstances.

(d) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(1) The victim was a fireman, peace officer or public servant concerned in official detention, as defined in 18 Pa.C.S. § 5121 (relating to escape), who was killed in the performance of his duties.

(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

(3) The victim was being held by the defendant for ransom or reward, or as a shield or hostage.

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.

(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and killed for the purpose of preventing his testimony against the defendant.

in any grand jury or criminal proceeding involving such offenses.

(6) The defendant committed a killing while in the perpetration of a felony.

(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

(8) The offense was committed by means of torture.

(9) The defendant has a significant history of felon convictions involving the use of threat of violence to the person.

(10) The defendant has been convicted of another Federal or State offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

(12) The defendant has been convicted of voluntary manslaughter, as defined in 18 Pa.C.S. § 2503 (relating to voluntary manslaughter), committed either before or at the time of the offense at issue.

(e) **Mitigating circumstances.**—Mitigating circumstances shall include the following:

(1) The defendant has no significant history of prior criminal convictions.

(2) The defendant was under the influence of extreme mental or emotional disturbance.

(3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(4) The age of the defendant at the time of the crime.

(5) The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under 19 Pa.C.S. § 309 (relating to duress), or acted under the substantial domination of another person.

(6) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal acts.

(7) The defendant's participation in the homicidal act was relatively minor.

(8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

(f) **Sentencing verdict by the jury.**—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(f) **Sentencing verdict by the jury.**—

(1) After hearing all the evidence and receiving the instructions from the court, the jury shall deliberate and render a sentencing verdict. In rendering the verdict, if the sentence is death, the jury shall set forth in such form as designated by the court the findings upon which the sentence is based.

(2) Based upon these findings, the jury shall set forth in writing whether the sentence is death or life imprisonment.

(g) **Recording sentencing verdict.**—Whenever the jury shall agree upon a sentencing verdict, it shall be received and recorded by the court. The court shall thereafter impose upon the defendant the sentence fixed by the jury.

(h) **Review of death sentence.**—

(1) A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules.

(2) In addition to its authority to correct errors at trial, the Supreme Court shall either affirm the sentence of death or vacate the sentence of death and remand for the imposition of a life imprisonment sentence.

(39) The Supreme Court shall affirm the sentence of death unless it determines that:

(i) the sentence of death was the product of passion, prejudice or any other arbitrary factor;

(ii) the evidence fails to support the finding of an aggravating circumstance specified in subsection (d); or

(iii) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.

(i) **Record of death sentence to Governor.**—Where a sentence of death is upheld by the Supreme Court, the prothonotary of the Supreme Court shall transmit to the Governor a full and complete record of the trial, sentencing hearing, imposition of the sentence and review by the Supreme Court.

APPENDIX B

Examples Of Highly Aggravated Cases In Which A Life Sentence Has Been Imposed Or Recommended By A Jury

Alabama

Duncan v. State, 436 So.2d 883 (Ala. Cr. App. 1983) (burglary at night in which mother and four year old son were killed, eight year old son wounded)

Arizona

State v. Schrock, 719 P.2d 1049 (Ariz. 1986) (robbery of elderly woman who died as a result of beating)

State v. Crilz, 666 P.2d 1059 (Ariz. 1983) (after argument defendant shoots and killed first victim at close range, then followed second individual to her home where he shot her to prevent call to the police)

State v. Morales, 630 P.2d 1015 (Ariz. 1981) (victim sodomized, handle of a hoe thrust up rectum, stabbed 19 times)

Arkansas

Hogan v. State, 663 S.W.2d 726 (Ark. 1984) (victim raped, kidnapped and murdered)

California

People v. (Leonard) Brown (1985) 169 Cal.App.3d 728 (two murders; defendant raped second victim's girlfriend next to the corpse)

People v. Talmantez (1985) 169 Cal.App.3d 443 (torture murder and racially-motivated murder special circumstances; defendant and accomplice announced intention to go "nigger huntin" and beat a young Black man to death; Court of Appeal described the occurrence as a "whole series of brutal and cruel acts, [a] continuum of sadistic violence")

People v. Pendleton (1985) 167 Cal.App.3d 413 (defendant shot and killed bar patron who refused order to stand still; defendant shot and blinded deputy sheriff)

People v. (Kenneth) Moore (1985) 162 Cal.App.3d 709 (two murders, 23 counts of robbery, 6 counts of burglary, 5 counts of rape, 3 counts of sodomy, 1 count of oral copulation and other crimes)

People v. Nobel (1982) Cal.App.3d 1014 (killing of deputy sheriff; the deputies "were ambushed and could not even defend themselves;" defendant "fired shot after shot with the intention of killing both [victim and partner]"

Colorado

People v. Lowe, 660 P.2d 1261 (Col. 1983) (murder of a child upon defendant had forced to perform fellatio)

Delaware

Ross v. State, 482 A.2d 727 (Del. Super. 1984) (contract killing victim stabbed 27 times)

McBridge v. State, 477 A.2d 174 (Del. Super. 1984) (wife of the aforementioned victim who arranged for the killing)

Florida

Spaziano v. State, 433 So.2d 508 (Fla. 1983) (jury recommended life in situation where defendant had mutilated and killed two women, judge overruled)

Bolender v. State, 422 So.2d 833 (Fla. 1982) (multiple murder plus torture, jury recommendation of life rejected by judge)

McCrae v. State, 395 So.2d 1145 (Fla. 1981) (rape torture of 67 year old woman, jury recommendation of life rejected by judge)

Louisiana

State v. Parker, 425 So.2d 683 (La. 1983) (multiple killings)

Missouri

State v. Roberts, 738 S.W.2d 606 (Mo.App. 1987) (victim shot, stuffed into trunk while still alive, shot a second time)

Nevada

Ybarra v. State, 679 P.2d 797 (Nev. 1984) (victim raped, set on fire, jury listed four aggravating and no mitigating circumstances)

New Jersey

State v. Serrone, 468 A.2d 1050 (N.J. 1983) (multiple killing, father and nine year old daughter)

North Carolina

State v. Prevette, 345 S.E.2d 159 (N.C. 1986) rape murder of 61 year old woman)

State v. Strickland, 298 S.E.2d 645 (N.C. 1983) (murder of one victim, rape torture of a second who survived)

Utah

State v. Hansen, 734 P.2d 421 (Utah 1986) (victim murdered when defendant torched home after tying victim up during burglary, crime repeated with second victim surviving)

Washington

State v. Bingham, 719 P.2d 109 (Wash. 1986) (victim raped and murdered)

State v. Kester, 686 P.2d 1081 (Wash. App. 1984) (victim raped and murdered)

APPENDIX C

SPSS.LIS LIFE ONLY, 1 AGGRAVATING AND 0 MITIGATING SPSS/PC +

Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Barron	Kevin		Lehigh	135183	05/03/83	White	Male	1958	Life	09/10/84	—
Boettcher	Barry	Michael	Bradford	831986	10/04/79	White	Male	1946	Life	05/24/83	Dead-Other Cause
Breidenstein	Michael	R	Berks	82127501	07/25/82	White	Male	1960	Life	05/20/85	—
Bricker	Robert		Allegheny	8104223	12/14/78	White	Male	1941	Life	02/02/88	—
Cartegena	Victor		Northampton	2951988	01/10/86	Hispanic	Male	1936	Life	—	—
Egleston	Larry		Allegheny	8006126	06/23/80	Black	Male	1962	Life	—	—
Fadden	Robert	Scott	Susquehanna	2941980	08/19/80	White	Male	1965	Life	02/18/82	—
Ferguson	John	P	Philadelphia	8103039923	12/31/80	Black	Male	1958	Life	12/07/82	—
Frankenberry	Joseph		Fayette	8112158	11/14/80	White	Male	1943	Life	11/15/82	—
Graves	Bernie		Allegheny	7901311	02/16/79	Black	Male	1953	Life	—	—
Harris	Bruce	G	Philadelphia	8210161811	09/19/82	Black	Male	1964	Life	02/05/86	—
Harrison	Robert	L	Philadelphia	8308230911	07/05/79	Black	Male	1967	Life	11/01/84	—
Heron	Betty		Allegheny	8306984	—	White	Female	1940	Life	12/29/83	—
Jackson	Harry		Philadelphia	8211357211	11/20/82	Black	Male	1949	Life	07/14/83	—
Joseph	Eric	C	Philadelphia	8404384211	02/22/84	Black	Male	1964	Life	01/30/85	—
Knabshulse	Harry	William	Fayette	8340	—	White	Male	1945	Life	01/03/84	—
Lines	Lawrence		Bucks	119488	12/14/84	White	Male	1944	Life	—	—
Long	Nathan		Philadelphia	8607082111	05/05/86	Black	Male	1948	Life	10/07/87	—
Lyles	Ryrene	T	Philadelphia	8410333011	02/11/84	Black	Male	1960	Life	—	—
Martinez	Ervin	A	Philadelphia	8406073511	08/25/82	Hispanic	Male	1966	Life	10/09/84	—
Massey	Jacquell		Philadelphia	8112196711	01/26/80	Black	Female	1932	Life	04/26/83	—
Nelson	William		Bucks	387884	07/14/82	Black	Male	1947	Life	—	—

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SPSS.LIS (Continued) LIFE ONLY, 1 AGGRAVATING AND 0 MITIGATING SPSS/PC +

Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Mitchell	Mark	A	Philadelphia	8404050812	02/22/84	Black	Male	1964	Life	01/30/85	—
Mitchum	Richard	R	Philadelphia	8006248311	09/11/80	Black	Male	1941	Life	07/23/82	—
Moore	Eugene		Philadelphia	8309174111	06/20/83	Black	Male	1956	Life	08/14/84	—
Nero	James	H	Philadelphia	8306343011	08/14/82	Black	Male	1953	Life	10/08/87	—
Person	Bruce		Philadelphia	8308255111	05/05/82	Black	Male	1950	Life	08/09/84	—
Prosdocimo	William		Allegheny	8104540	12/14/78	White	Male	1951	Life	11/07/83	—
Reid	Robert	A	McKean	81215	10/28/81	White	Male	1949	Life	04/07/82	—
Robon	Felix		Philadelphia	8409104922	02/01/84	Hispanic	Male	1954	Life	08/06/85	—
Sanford	Ch. res		Philadelphia	8412023022	10/25/84	Black	Male	1951	Life	05/12/87	—
Tucker	Michael		Lehigh	531979	12/13/78	White	Male	1954	Life	—	—
Tomasak	Phoebe	Louise	Fayette	16881	11/14/80	White	Female	1933	Life	08/14/82	—
Williams	Clifford	L	Philadelphia	8507384911	12/23/83	Black	Male	1948	Life	08/04/87	—
Young	Willie	Lamar	Philadelphia	8307385111	08/17/81	Black	Male	1959	Life	07/09/86	—
Younkin	Elmer	Wayne	Fayette	1601981	11/14/80	White	Male	1929	Life	11/15/82	—

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REPORT.LIS
DEATH ONLY, 1 AGGRAVATING AND 0 MITIGATING
SPSS/PC +

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Defendant	First Name	Middle Name	County	CP Number	Date of Offense	Race	Sex	Year Born	Sentence	Date of Sentence	Current Status
Beasley	Leslie	Charles	Philadelphia	8011060911	04/13/80	Black	Male	1961	Death	05/10/82	Death Affirmed
Blystone	Scott	Wayne	Payette	21984	09/10/83	White	Male	1966	Death	04/17/86	Death Affirmed
Cooper	Carl	M	Philadelphia	8310008911	01/07/83	Black	Male	1949	Death	05/15/85	Life
Frederick	Edward	Lee	McKean	1631982	06/18/82	White	Male	1947	Death	11/10/83	Life
Lambert	Eugene		Philadelphia	8113084211	12/06/81	Black	Male	1945	Death	10/02/86	Life
Lark	Robert		Philadelphia	8001201211	01/09/80	Black	Male	1953	Death	06/23/86	Death Affirmed
Lewis	Reginald	S	Philadelphia	8202020511	11/21/82	Black	Male	1954	Death	06/25/84	—
Morris	Kelvin		Philadelphia	8207040911	06/09/80	Black	Male	1956	Death	09/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Stokes	Ralph	Trent	Philadelphia	8203457611	03/11/82	Black	Male	1963	Death	06/09/87	—
Taylor	Joseph	James	Philadelphia	8502020211	01/19/85	Black	Male	1965	Death	12/03/86	Life

Number of Cases = 12